Rambend Realty Corporation, d/b/a Ramada Inn of South Bend *and* Betty V. Colcord *and* Local Union No. 103, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO. Cases 25-CA-13325, 25-CA-13325-2, and 25-CA-13522

23 November 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 27 August 1982 Administrative Law Judge George Norman issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Rambend Realty Corporation, d/b/a Ramada Inn of South Bend, South Bend, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 1(b) and reletter the present paragraph 1(b) as paragraph 1(c).

"(b) Threatening employees with stricter enforcement of work rules because they have sought the assistance of a union."

2. Substitute the attached notice for that of the administrative law judge.

[1] On 26 October 1981 the judge granted the Respondent's motion to sever Cases 25-CA-10380 and 25-CA-10548 from the other three cases involved in this proceeding. On 2 November 1981 the General Counsel filed with the Board a special request for permission to appeal the judge's ruling. By telegraphic order dated 9 December 1981 the Board denied the General Counsel's request to appeal the judge's decision to sever. No exceptions have been filed to this ruling by the judge. Therefore, Cases 25-CA-10380 and 25-CA-10548 are not before us for consideration in this proceeding. In adopting the judge's ruling on this point, however, we do not rely on *Jackson Mfg. Co.*, 129 NLRB 460 (1960), which was cited in fn. 1 of his decision.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In fn. 17 of his decision, the judge incorrectly stated that Rosemary Jones testified about remarks which were made to her by Bell in January and February 1982, rather than in January or February 1981. In the first paragraph of the "Discussion and Conclusions" section of his decision, the judge incorrectly stated that subpar. 5(c) of the complaint in Case 25-CA-13522, as ultimately amended, alleged that the Respondent promulgated a rule in April 1981, rather than in late February 1981. In the last paragraph of the "Discussion and Conclusions" section of his decision, the judge incorrectly stated that the Respondent rehired 17, instead of 18, former employees. We therefore correct these inadvertent errors.

[3] The General Counsel has excepted to the judge's failure to discuss whether or not the remarks made by Food and Beverage Director Bell during a conversation with employees Rosemary Jones and Maxine Eaglebarger in late January or early February 1981 constituted unlawful threats and solicitations as alleged by the amended complaint in Cases 25-CA-13325 and 25-CA-13325-2. We find there is no credible evidence to warrant a conclusion that Bell made any statements during this conversation which violated Sec. 8(a)(1), since the judge generally discredited the testimony of employee Jones and the credited testimony of employer Eaglebarger about this conversation does not support a finding of any 8(a)(1) violations. Accordingly, we shall dismiss the 8(a)(1) allegations of the complaint in Cases 25-CA-13325 and 25-CA-13325-2.

In adopting the judge's conclusions that Bell's conduct in February, March, and July 1981 violated Sec. 8(a)(1), we note that no exceptions have been filed as to these violations found by the judge. We also note that, in the "Conclusions of Law" section of his decision, the judge failed to list as an independent 8(a)(1) violation the March 1981 threat to enforce work rules more strictly because employees sought the assistance of the Union, which he had previously found to have occurred. We therefore correct this inadvertent omission.

We agree with the judge's conclusion that the Respondent's refusal to rehire eight former employees did not violate Sec. 8(a)(3) and (1). In so concluding, however, we find it unnecessary to rely on his legal analysis and the cases cited by him in the "Discussion and Conclusions" section of his decision regarding the standard for establishing a prima facie case of discrimination, including his analysis of the type of knowledge necessary to prove a violation. Even assuming, arguendo, that the General Counsel has established a prima facie case in this proceeding, we find that Respondent has met its burden of showing that it would have made the same decision in the absence of any union or protected concerted activities. We also note that the judge failed to list David Colcord as one of the eight alleged discriminatees in par. 5 of the "Conclusions of Law" section of his decision, although he had previously concluded the 8(a)(3) allegations regarding all eight former employees should be dismissed. We therefore correct this inadvertent omission.

[4] We have modified the judge's recommended Order to follow and remedy more accurately the actual violations found. We have also modified the judge's notice to conform to our Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate rules prohibiting our employees from playing video games; sitting down

in the back during worktime; smoking in the hallway behind the bar; and requiring employees to remain at their break stations at all times because they have exercised their rights protected by the Act.

WE WILL NOT threaten our employees with stricter enforcement of work rules because they have sought the assistance of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

RAMBEND REALTY CORPORATION, D/B/A RAMADA INN OF SOUTH BEND

DECISION

STATEMENT OF THE CASE

GEORGE NORMAN, Administrative Law Judge: These cases were tried in South Bend, Indiana, on October 26, 27, 28, and 29, 1981, and January 4, 5, 6, and 7, March 9, 10, 11, and April 27, 28, and 29, 1982.

On March 20, 1981, Betty V. Colcord, a former employee of Rambend Realty Corporation, d/b/a Ramada Inn Hotel of South Bend, herein the Respondent, filed an unfair labor practice charge, Case 25-CA-13325, alleging that the Respondent had refused to rehire her because of her prior union activities. After that Local Union No. 103, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein the Union, filed a charge in Case 25-CA-13325-2, alleging that the hotel had refused to rehire certain other former employees because of their membership in, and activities on behalf of, the Union.

On May 8, 1981, the Regional Director for Region 25 issued an order consolidating cases, consolidated complaint and notice of hearing in Cases 25-CA-13325 and 25-CA-13325-2. The material allegations of this consolidated complaint charges the Respondent with unlawful threats and coercion and the unlawful refusal to rehire seven named former employees. The allegations in this consolidated complaint were limited to conduct allegedly occurring from mid-January 1981 to mid-February 1981.

On May 12, 1981, the Union filed another charge, Case 25-CA-13522, alleging that Karen Gobel, also a former employee, had not been rehired because of her membership in, and activities on behalf of, the Union. The Regional Director on June 16, 1981, issued an order consolidating cases, complaint and notice of hearing in Cases 25-CA-13325, 25-CA-13325-2, and 25-CA-13522. As in the earlier consolidated complaint issued May 8, 1981, the allegations of the new complaint were narrowly drawn, charging only a single unlawful act of refusal to rehire occurring on January 20, 1981. Thus, all the allegations of the conduct violative of Section 8(a)(1) and (3) of the Act contained in the three consolidated cases were expressly limited to events reportedly occurring between mid-January 1981 and mid-February 1981. The Respondent in its answer denies the substantive allegations and admits the jurisdictional allegations.

On October 14, 1981, the Regional Director issued another order consolidating cases, consolidated complaint and notice of hearing. By this order the Regional Director consolidated with the three above-referenced charges, Case 25-CA-10380, which had been deferred to arbitration on December 18, 1978, involving the discharge of three employees, and Case 25-CA-10548 which had been settled on May 31, 1979, involving allegations of unlawful threats and coercion.

Thereafter on October 20, 1981, the General Counsel amended the complaint in Case 25-CA-13522 to include allegations of conduct violative of Section 8(a)(1) of the Act. This conduct purportedly occurred in late February and late July 1981.

The trial in these consolidated cases and amended cases began on October 26, 1981. On the first day of the trial I heard oral arguments from both the General Counsel and the Respondent on the Respondent's motion to sever Cases 25-CA-10380 and 25-CA-10548 from the three original consolidated cases, Cases 25-CA-13325, 25-CA-13325-2 and 25-CA-13522. After considering these arguments and applicable Board authority, I granted the Respondent's motion to sever Cases 25-CA-10380 and 25-CA-10548.[1]

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Briefs were filed on behalf of the General Counsel and the Respondent. Based on the entire record and the briefs filed on behalf of the parties, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation organized under, and existing by virtue of, the laws of the State of Indiana. At all times material herein, the Respondent has maintained its principal office and place of business in South Bend, Indiana, and is engaged at that facility in the business of operating a motel and restaurant. During the past year the Respondent, in the course and conduct of its business operations, sold and distributed products valued in excess of $500,000. During the same period, the Respondent received goods valued in excess of $5,000 transported to its facility directly from States other than the State of Indiana. The Respondent admits, and I find, that it is an em-

[1] In granting the Respondent's motion to sever, I expressly relied on the extraordinary lapse of time between the deferral to arbitration in Case 25-CA-10380 and the settlement agreement in Case 25-CA-10548 and the eventual consolidation on October 14, 1981, 12 days before the hearing commenced. I also concluded that the 12 days' notice to the Respondent, after almost 3 years of inaction by the Region, was insufficient to allow the Respondent to prepare its case adequately. Consistent with Board precedent, I also agreed with the Respondent that if the Regional Director could rescind the settlement agreement reached May 31, 1979, in Case 25-CA-10548 based on the wholly unrelated allegations contained in the three original charges that the sanctity of and the reason behind settlement agreements would be vitiated. See *Jackson Mfg. Co.*, 129 NLRB 460, 475-476 (1960).

ployer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Facts*

The Respondent owns and operates a Ramada Inn in South Bend, Indiana. The hotel, which opened in early 1970, consists of two operations, the lodging portion and the food and beverage part, which includes a restaurant, banquet facility, and a separate bar or night club. The daily operations of the hotel are controlled by General Manager Dale Whipstock, who held that position from April 1980 until his death on April 26, 1982. Whipstock was preceded as general manager by Nancy Marvel, who held the position for a number of years. Reporting directly to the general manager is a food and beverage director, who is responsible for managing the restaurant and lounge operation. Fred Bell, who was hired for this position in December 1980, is the current food and beverage director.

The managerial staff also consists of a lounge manager, kitchen manager, and dining room manager. Nora Clark has been the lounge manager since September 1981. She was preceded as lounge manager by Cindy Hocker. All lounge employees report directly to the lounge manager, who also assists the food and beverage director in controlling liquor and labor costs in the lounge. Irma Jean Lillvis is the dining room manager and has held this position since November 1981. Lillvis was preceded in that position by Wanda Walinski. The dining room manager is responsible for seating customers and directing and scheduling the dining room waitresses and busboys. Myrene Harris, the kitchen manager, directs the food preparation.

Except for the front desk employees the hotel's employees are represented by the Union and are covered by a collective-bargaining agreement. The Union was certified as exclusive bargaining representative for the housekeeping employees in mid-1970 shortly after the hotel opened. This unit covered only the maids and maintenance personnel employed in the lodging portion of the hotel. On January 12, 1973, the Union won an election among the food and beverage employees and thus became the collective-bargaining representative of the employees in the restaurant and bar.[2] The parties immediately entered into negotiations on April 1, 1973, and entered into a collective-bargaining agreement separate and distinct from the housekeeping contract. In 1976, the parties agreed to a single collective-bargaining agreement covering both units. However, under the single contract separate seniority lists were maintained for each of these respective units. The parties reached an agreement in 1979 and at the time of the hearing were engaged in negotiations for a new contract.

On February 23, 1980, the hotel's restaurant and lounge were destroyed by fire but the lodging portion of the Respondent's operations was not affected. It continued operating uninterrupted throughout the reconstruction of the restaurant and lounge. Although there was a single agreement covering both the housekeeping and restaurant and lounge employees, for the purpose of reductions in force, as previously noted, the seniority lists of the two operations were separately maintained. Thus, all the restaurant and lounge employees were laid off on February 24, 1980. None was able to exercise his or her seniority to "bump" any less senior employee from the housekeeping staff.

Reconstruction of the restaurant and lounge areas was completed in early January 1981, with the opening occurring on Friday, January 23, 1981. The restaurant and lounge opened with a bargaining unit complement of 38 employees.[3] This group included 16 employees who were employed by the hotel on February 23, 1980, the day of the fire, and two other former employees who had quit shortly before the fire. Offers of employment had been made to two other persons who were working February 23, 1980, but the offers were rejected. Twenty other applicants who had not been previously employed by the hotel completed the new staff.

B. *Before the Fire*

As previously stated the Respondent's operation consisted of guest rooms, a restaurant, and a lounge. The restaurant was used mainly for hotel guests, although it was open to the general public. The evidence indicates that the business in the restaurant before the fire had been generally slow, necessitating occasional layoffs, and in 1979 the restaurant's business started a steady decline that lasted until the fire in February 1980.

The lounge, although opened to the general public, relied heavily on business from hotel guests. The lounge consisted of two different rooms, the front bar and the back lounge. The front bar as compared to the back lounge was small. The front bar area had a seating capacity of 98, which included individual tables and bar stools. The bar was 10 feet long and had 8 to 10 bar stools. Customers were served either by a waitress or directly by the bartender. Business in the front bar was slow especially during the day. It became busy during the few weekends when home football games were held at the University of Notre Dame, which was nearby. On these occasions there would be approximately 75 customers in the front bar area. Except during those weekends

[2] This unit includes cooks, salad and pantry helpers, dishwashers, bus boys and waitresses in the restaurant, and bartenders and cocktail waitresses in the bar. The unit description expressly excludes housekeeping employees who were covered by the earlier certification.

[3] The restaffing process began in late December 1980 and was completed just prior to the actual opening. The 42 food and beverage employees who had been laid off on February 24, 1980, because of the fire had lost their status as employees after 6 months of inactivity in accordance with the collective-bargaining agreement, art. XIII, sec. 14(d). The Union had filed a grievance on this issue but arbitrator Malcolm House denied the grievance, holding that all 42 employees employed in the restaurant and lounge on February 23, 1980, lost their seniority and employee status 6 months after their last day of employment. Thus, the 42 laid-off employees were in the same position as any other applicant in January 1981.

each year the front bar would be slow, with few customers often resulting in the bar closing early. On other rare occasions when the front bar would be busy during the remainder of the year there might be 50 to 60 customers in the bar. The front bar was normally staffed by one bartender and one cocktail waitress, although there were occasions when an extra bartender had to be assigned to the front bar because the bartender on duty was unable to provide adequate service to the customers.

Also, as previously indicated, the back lounge was larger than the front bar and could be expanded further by removing removable walls and annexing adjacent banquet area space. The back lounge was served by a service bar which was normally staffed by two bartenders and varying numbers of cocktail waitresses depending on the crowd. Both the front bar and the back lounge had computerized measured-pour systems regulating the mixing of drinks for cost and quantity control. In the back lounge all customers were served by cocktail waitresses. Customers could not order their drinks directly from bartenders. Thus, because of the absence of tips, the bartenders earnings would have been lower but for the large hourly wages paid to them to help make up the difference. The back lounge attracted customers who liked live entertainment and who often ordered specialty drinks. On those busy weekends when football games were played, there were 300 to 400 customers in the back lounge. On other weekend nights there might be approximately half that number. On week nights the service bar could, like the front bar, be very slow, often serving less than 50 to 100 customers a night. The evidence indicates the low level of business was attributable to such factors as poor management and the absence of "name" entertainment. In addition, during the period prior to the fire supervisor personnel turnover was high. In a 2-year period, four persons filled the food and beverage director's position, Jack Terryia, Don Alexander, Ron Tantun, and Chuck Myers. Several changes also occurred in the lounge and dining room supervisory positions.

C. *After the Fire*

The Respondent began planning and working on reconstruction of the restaurant lounge immediately after the fire. Obviously, without a restaurant and lounge, the hotel guests had to go elsewhere for meals and cocktails, thus causing a loss of revenue.[4]

After the fire, the Respondent's management changed completely, with new personnel occupying each of the key supervisory positions. Dale Whipstock, who had been the lounge manager at the time of the fire, replaced Nancy Marvel as general manager in April 1980. In November 1980, Fred Bell was interviewed for the food and beverage director's position. Bell was hired and began working on December 1, 1980.[5] Bell, who was given complete control over the operation of the restaurant and bar, began working immediately on the restaffing. He promoted Cindy Hocker to the position of assistant food and beverage director and lounge manager.[6] In that position Hocker was given responsibility for cost control, purchasing liquor, maintaining records, and hiring all employees for the lounge. Bell testified that he delegated to her his control over the hiring decisions for the lounge since she was to be responsible for that part of the food and beverage operations. Bell said he did this because Hocker had to supervise and work with these people, and he wanted her to select a group in which she had confidence. Hocker's prior experience with the hotel and her past association and familiarity with the former employees permitted her to select those she thought were the good workers and who got along with fellow employees and customers.

Bell and Hocker then began the restaffing in late December 1980. They had a list of persons who had been employed on February 23, 1980, the day of the fire. Hocker then prepared a list of the former employees and, on December 30, 1980, she mailed a letter signed by Bell, to those working at the time of the fire, inviting applications.[7] Many of the former employees came in to fill out applications.[8] Bell spoke with a few of the former employees at that time while others just submitted applications and left. Hocker then phoned those who applied and scheduled interviews. Bell interviewed separately each of the former 27 employees who applied.[9] General Manager Whipstock was present during a few of these interviews and Hocker was "in and out" for many of them, but Bell conducted the interviews. Whipstock and Hocker said very little.

During these interviews Bell asked the former employees questions related to topics listed on an interview analysis form which he filled out for each applicant. Bell asked Hocker about most of the applicants and a number of called references given by the former employees.[10]

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[4] In May 1980 the hotel opened a small portable bar in a guest suite. Betty Colcord, an alleged discriminatee who was the most senior bartender, was called back to and did work that bar. However, because of slow business that bar was closed after 6 or 7 weeks.

[5] Bell, who left the Atlanta American Hotel to come to South Bend, has been in the hotel restaurant bar business in managerial staff positions for a number of years. The Respondent contends that Bell was hired in an attempt to transform the hotel into a successful operation.

[6] Hocker was promoted from a desk clerk position on the lodging side of the hotel, which she had held since April 1980. Hocker first began working for the hotel in May 1976 until February 1978. She performed most of the positions in the lounge, including cocktail waitress, cashier, and fill-in bartender. During that period she was a member of the Union. She quit in February 1978 to take a job in Arizona. She was reemployed in April 1979, starting as a part-time cashier. She later became a bartender and then assistant lounge manager to Dale Whipstock. During that period she was again a member of the Union. (The collective-bargaining agreement contained a union-security clause.) In October 1979 Hocker left the employ of Respondent and returned in April 1980 to be a desk clerk.

[7] As previously indicated, the hotel was not contractually obligated to hire any of the former employees.

[8] Hocker phoned Jean Williamson who had quit on February 11, 1980, 2 weeks before the fire, and asked her to reapply. Hocker was told that Williamson wanted to come back but had not received a letter.

[9] Of the 42 employees working at the time of the fire who were sent letters inviting them to apply, 15 had not applied.

[10] Bell and Hocker testified that part owners Walz and Meloy and Manager Whipstock made some recommendations on particular employees but they (Bell and Hocker) were not bound by those recommendations. Bell said that Walz, Whipstock, and Meloy had different feelings about employees so the advice was not very helpful. Bell also testified that he ignored their recommendations on a number of occasions, either because of his own feelings following the interviews or because Hocker had told him "the real" story.

Bell then decided which of the former employees would be offered positions in the kitchen and dining room and Hocker decided which would be offered positions in the lounge. Hocker's decisions apparently were based largely on her own knowledge of the applicant's abilities and prior performance.[11] The interviews took approximately 2 days to complete.

Having tentatively decided on the former employees, the Respondent advertised for applicants in the local newspapers. In the first 2 days approximately 500 applicants responded. Many who took applications did not turn them in or wait to be interviewed because of the great number of applicants. The Respondent received 216 completed applications in addition to those from the 38 persons who were hired. Because of the large number, Bell shared the interviewing with Whipstock and Hocker. As they met with the applicants briefly, Bell and Whipstock would place a number from 1 to 10 in the top right corner of each application indicating a preliminary rating. Then they reviewed and sorted through the applications, calling back those that appeared the most promising.

Those who were called back for a second interview were interviewed by Bell during which he filled out an interview analysis form for each. Bell and Hocker then sorted through these applications, separating them according to job classifications. Bell gave Hocker the bartender and cocktail waitress applications, instructing her to select those she thought promising. Hocker called eight applicants back for a third interview. After interviewing these applicants on her own she checked their references, and made her hiring decision.[12] Just before the restaurant and lounge reopened, Hocker told Whipstock she needed more cocktail waitresses. Whipstock told her to do what was necessary. Waletzko, a bartender she had hired, recommended Debra Tom who was a waitress at a bar where Waletzko had been employed. Hocker called Tom, informed her of the opening, explained that it might be part time or temporary and asked if she were interested. Tom came in and submitted an application on January 19, 1981, and was hired to start on opening night January 23, 1981.

Bell testified that, after reviewing his notes on the applicants who had responded to the newspaper advertisement, he called back the most promising kitchen and dining room applicants for a third interview. He said the kitchen and dining room were much more difficult to staff than the lounge, therefore the interviews were longer and more intensive, especially with regard to the applicants for cook positions. The training for bartender or cocktail waitresses was much shorter and easier than that for cooks and other kitchen employees. Bell hired 12 former restaurant and kitchen employees,[13] and 12 who had responded to the newspaper advertisement.[14]

The number of interviews for the applicants varied from one for some former employees to as many as four for those responding to the newspaper ad, depending on the positions to be filled and which group was being interviewed.

After all the hiring decisions had been made the prospective employees were invited to an orientation meeting, at which Bell discussed what he required from his employees, the applicable work rules, and the union shop obligations of all bargaining unit employees. He also answered questions and required the employees to fill out W-2 forms and union dues-checkoff forms. This meeting was the culmination of the interviewing and hiring process. The restaurant and bar opened the following Friday, January 23, 1981.

As previously stated, the restaurant and bar reopened on Friday, January 23, 1981, with a complement of 38 bargaining unit employees. During the first few months of operation a number of the employees quit or were discharged, particularly in the lounge. Employee turnover is common in the restaurant and bar business. And in some aspects of the food service industry the employee turnover approaches 400 percent per year.[15]

D. *Physical Layout of the Restaurant and Lounge after the Reconstruction*

When the restaurant and lounge had reopened substantial changes had been made in the hotel's physical layout and method of operation. The lounge, before reconstruction, consisted of a relatively small and quiet front bar, known as The Brass Nail and a somewhat larger back area that was served by a small service bar. The front bar was normally staffed by one bartender and one waitress, while the service bar had one or two bartenders and a few waitresses. In contrast, the new lounge consisted of one large room capable of being expanded by moving the portable partition that separated the restaurant. There is one large bar approximately twice as large as the old front bar. In addition, there is a small porta-bar in the rear of the lounge, and a third bar known as Ziggy's by the adjoining pool.

[11] Of the 27 former employees that reapplied, Hocker made the final decision on 8. She rejected Betty Colcord, Edith Cantrell, and Karen Gobel and offered jobs to Rhonda Breda, Nora Clark, Kaye Zurawski, Adrienne Hogan, and Sandy Stickler, all of whom applied for lounge positions. Bell made the final decision on the other 19 former employees. He rejected of the other five discriminatees Madelyn Bogart, Cindy Borkowski, Bernice Rankel, Virginia Rose Forsberg, and David Colcord.

[12] New hires included Terry Waletzko, a bartender, and seven cocktail waitresses, June Stanley, Kris Coughlin, Jennifer Harness, Carolyn Barrick, Rebecca Dibble, and Elizabeth Kulwicki. Hocker also hired Debra Paulson, who had worked for the hotel and with Hocker from 1976 to 1979. Jennifer Harness, who was initially listed as a dishwasher because she was not yet 21 years old, worked in the kitchen for a few days and then was transferred to the lounge on her birthday.

[13] They were Melissa Phillips, Jan Davenport, and Jean Lillvis, dining room waitresses; Rosemary Jones and Paul Jones, cooks; Maxine Eaglebarger and Jean Williamson, pantry cooks; Tom Banney and Jim Gerbin, dishwashers; Rob Johnstone, Bob Jordan, and Jena Troyer, bus help.

[14] The new hires were Myrene Harris and Dell King, cooks; Francis Colen, Jeannie Lopez, Judy Borowiak, Ann Marie Klawiter, Pat Grossnickle, Phyllis Miller, Karen Horvath, Cathy Hiatt, and Teresa Harpole, dining room waitresses; and Jim Lesichi, bus help.

[15] In the 9 months following the reopening, approximately 19 employees, who were working on January 23, 1981, quit and did not return or were fired. These included Adrienne Hogan, Sandy Stickler, Rosemary Jones, Paul Jones, Tom Banney, and Robert Johnston, all of whom were former employees, and 13 others including Terry Waletzko, Kris Coughlin, Debra Paulson, Carolyn Barrick, Rebecca Dibble, Elizabeth Kulwicki, Judy Borowiak, Ann Marie Klawiter, Pat Grossnickle, Phyllis Miller, Teresa Harpole, Dell King, and Jim Lesichi. Two other employees, June Stanley and Cathy Hiatt, quit and then were rehired.

On Wednesday, Friday, and Saturday nights, the lounge is staffed by a total of six bartenders—four at the main bar and one each at the porta-bar in Ziggy's. At the main bar, the four bartenders are assigned stations, one fixed station at each end of the bar where the cash registers are and two roving bartenders who handle all the business in between. These stations are rotated among the bartenders so that they all work the different areas. For speed, efficiency, and cost control the main bar has a computerized drink dispensing system which interlocks with the cash register.

The new lounge operations attracted a much younger clientele and attracted large crowds. The crowds became so large that bartenders and cocktail waitresses referred to certain nights as "animal nights." On a typical evening there were 400 to 600 customers on those nights and occasionally 800 to 900. Bartender Frank Mancuso testified that customers "would be four deep the entire length of the 20 foot long main bar."[16] On those nights the bartenders and cocktail waitresses were constantly busy. Rhonda Breda and Nora Clark, who worked both bars before the fire and who were rehired, explained that the pace was much faster and harder after the reopening. Speed became absolutely essential for all bartenders.

On Monday, Tuesday, and Thursday, three bartenders are on duty, two at the main bar and one at Ziggy's. On these nights there are at least 150 to 200 customers in the bar at any one time. On Sundays, only Ziggy's is open with one bartender handling that bar.

Under Hocker's management the lounge had become more of a night club, featuring name rock'n'roll bands Monday through Saturday. Rhonda Breda testified that the bartenders had to rely on one another and that team work was more essential after than before the fire.

Even considering the testimony of the three union stewards, there is no testimony in this case that Bell and Hocker ever discussed or considered the prior union activity, union support, or union sympathies of any of the applicants. On the contrary, there is evidence that they did not discuss or consider the union activities or sympathies and that Bell, personally, did not look at the personnel file of the former employees or discuss their contents with Hocker. Every applicant who testified on the point, including the alleged discriminatees and current union stewards, was consistent in stating that union activity, support, or sympathies including the filing of grievances were not discussed during the employment interviews.[17]

[16] The crowds were so large that in early 1982 the local fire marshal limited the number of customers at any one time to the posted capacity of 450.

[17] Rosemary Jones, a cook rehired by the Respondent but not in the employ of the Respondent at the time that she testified, testified on direct examination that Bell made remarks to her during January and February 1982 after the opening of these proceedings to the effect that he did not like the Union because when he was a boy a bomb had been thrown into his house. Bell told her that if it were left up to him there would not be a union in there (Bell did not deny or admit these remarks in his testimony).

She testified also that when the arbitrator's decision was issued Bell was "jumping up and down" and was glad the Union had lost and that he did not have to worry about hiring back the other employees. She said that Bell had told her that they had "went through a list and picked out the ones they wanted to come back to work and he knew who he was going to hire before he hired them . . . he already knew who was coming back to work." Her recollection was then refreshed with her pretrial affidavit. She adopted the following as a comment Bell had made to her: "Mr. Bell said that the owners had went through the applications and had picked the best workers to be hired back and did not hire back the ones that caused trouble with the union." She also testified that Bell said "he didn't want anybody there that would cause trouble with the union—troublemakers have caused trouble with the union." She also testified that Bell remarked he did not want Cindy Borkowski, Betty Colcord, and Madelyn Bogart. He said they had caused trouble, and did not do their work and they stood around and smoked cigarettes and did not treat their customers right. However, when Jones' testimony is compared with other statements made by her and the testimony of Bell and Maxine Eaglebarger, who was present, it appears that Jones distorted the facts. On cross-examination Jones admitted that a number of former employees who she considered active in the Union, including herself, had been rehired and that Bell was not bothered by union activism. She went on to say that Borkowski was not a troublemaker and did not file grievances, and that Bell told her that Borkowski, Colcord, and Bogart were not hired because they sat around, smoked cigarettes, and did not treat customers right and the owners had instructed them to select the best workers. Eaglebarger testified that Bell said the troublemakers did not get rehired but stated that Bell never mentioned the Union or filing grievances and she did not equate Bell's use of the word troublemaker with grievance filers or union activists because she knew of employees who filed a lot of grievances and were rehired. In addition, Jones admitted that Bell never said he would not hire someone because of his or her union support or activity and that she was not afraid to file grievances. Jones described herself along with Bogart, Colcord, Borkowski, Eaglebarger, Jean Williamson, Jim Derbin, and Millie Phillips as active employees in the Union prior to the fire. Jones also described a troublemaker as someone who would have the Union in there constantly or having grievances filed with the shop stewards, and then stated since she had filed a grievance she must have been a troublemaker. In view of the many inconsistencies in her testimony, I credit Bell and Eaglebarger and I do not credit Jones.

[18] That Cantrell was slow was supported by the testimony of Rolley Busco, a former bartender who had not reapplied. He said Cantrell always looked slow and could not keep up when it got busy and that he would not qualify Cantrell as a speed bartender. Rhonda Breda, who tended bar before and after the fire, testified that Cantrell could not have kept up with the pace required after the opening. Other employees including Kaye Zurawski, a union steward, agreed that Cantrell was very slow. When Cantrell got behind and management asked that someone help her out, to avoid working with her, Nora Clark and Zurawski exercised their seniority rights. Thus Rhonda Breda with least seniority had to work with Cantrell. Fellow discriminatee Karen Gobel also complained about how slow Cantrell was.

[19] Kaye Zurawski, a union steward, said she "could not think of one nice thing to say about Cantrell."

E. *The Alleged Discriminatees*

1. The bartenders

Edith Cantrell, an alleged discriminatee, was hired as a cocktail waitress in June 1972 and became a bartender in 1976. She worked as a bartender in the front bar until she was laid off as a result of the fire. She received a letter to reapply and did in January 1981 and was interviewed by Fred Bell.

Before and after interviewing Cantrell, Bell consulted Hocker. Hocker was surprised that Cantrell had applied because she knew Cantrell had gone into business for herself. Hocker testified that she told Bell that she had worked with Cantrell before and because she was so slow Hocker did not think Cantrell could keep up with the pace expected in the new lounge.[18] Hocker also testified that Cantrell did not get along well with other employees.[19] Hocker told of a dispute that occurred be-

tween Betty Colcord, another alleged discriminatee, and Cantrell over dividing certain tips. Hocker said that Cantrell had a reputation for dishonesty.[20]

Bell testified that when he interviewed Cantrell he asked her whether she considered herself a speed bartender. Cantrell replied that she was slow but efficient. When Bell asked her how she got along with other employees Cantrell responded, "if there were some that didn't get along with me, that was their problem." Rhonda Breda testified that she, Nora Clark, and Kaye Zurawski all disliked Cantrell. Based on that interview and Hocker's comments, Bell recommended to Hocker that Cantrell not be rehired. Hocker however made the final decision not to rehire Cantrell. Hocker stated that she personally had many bad experiences with Cantrell in the past and that including the numerous negative remarks from other employees concerning Cantrell persuaded her not to rehire Cantrell.

Betty Colcord, an alleged discriminatee, was hired in 1970 as a dining room waitress. Shortly thereafter she became a cocktail waitress and held that position for 3 years until she became a bartender. Colcord worked as a day bartender in the front bar until the fire. In January 1981, she received a letter to apply and did. She was interviewed by Fred Bell who had already heard of Colcord before the interview. Bell testified that after he was hired by the Respondent on December 1, 1980, he ate most of his meals at other hotels in South Bend so that he could see how other area operations were run and to learn about his new Employer's reputation in the community. On one of Bell's visits to the Quality Inn he asked the bartender and waitress about the Ramada Inn Lounge. They told Bell that there was a bartender there who kept a messy bar, watched soap operas all day, and ignored customers. Upon returning to the hotel he asked Hocker, who was still working as a desk clerk, if the hotel had a bartender that kept an untidy bar and watched soap operas all day. Hocker immediately replied that it was Betty Colcord.

Bell and Hocker also discussed Colcord after she had submitted an application. Hocker informed Bell that Colcord was slow, often ignored customers and waitresses, and that cocktail waitresses would often have to make their own drinks rather than wait for Colcord.[21] Colcord also had a reputation for keeping a messy bar and not cleaning up the bar for the night crew. She would leave unwashed glasses in the dishwasher, dirty shelves, and spilled juice on the countertops.[22]

Colcord testified that she had a loyal following of 20 to 30 customers and was on a first-name basis with them. Sandy Stickler, however, testified that Colcord had only five or six regular customers. June Stanley, who knew Colcord since she was a child and called her, "Aunt Betty" testified that Colcord attempted to convince Stanley to perjure herself at the hearing by testifying that Bell made coercive and unlawful comments. On the basis of Stanley's testimony which was frank and candid, her relationship to Colcord, and her demeanor while testifying, convinces me that she was telling the truth. Bell was not impressed by Colcord in the interview and recommended that she, along with Cantrell and other lounge employees, be rejected. However, the final decision was left to Hocker. Hocker had worked with Colcord for years and because of her knowledge of Colcord's past performance Hocker decided not to hire her.

Three former employees were hired as bartenders, Nora Clark, Kaye Zurawski, and Rhonda Breda. Nora Clark was hired as waitress November 1978. A few months later she became a bartender, a position she held until the fire. As a bartender Clark worked mainly at the back service bar but would occasionally work the front bar when Colcord was not on duty. Bell interviewed Clark but made no recommendations concerning her. Hocker, who knew Clark and had worked with her, considered Clark a hard worker and a fast bartender. Hocker also thought Clark had a good personality and was good with customers. Hocker hired Clark.

Kaye Zurawski began as a bartender shortly after she was hired as a waitress in 1976. Zurawski worked in the service bar until the fire. She was interviewed by Bell. Bell made no recommendation with respect to her. Zurawski was known by Hocker as one who got along well with other employees and was there to "pitch in," even on her days off. Hocker considered Zurawski fast and able to handle the expected volume in the new bar. Hocker hired Zurawski. In addition, other witnesses agreed with Hocker that Zurawski was a good, fast bartender who was efficient and got along with the customers.

Rhonda Breda was hired as cocktail waitress in 1975. Nine months after that she became a bartender and remained in that position until she was laid off after the fire. Breda worked nights in the service bar but would fill in for Colcord on her days off in the front bar and assisted Cantrell when she fell behind. Bell interviewed Breda and checked her references. The manager at the Quality Inn told Bell that Breda was good but had a tardiness problem. Brenda Buck, a bartender at the Quality Inn, told Bell that Breda did not get along well with the manager and to take what he said with a grain of salt. Buck told Bell that Breda was a good speed bartender.[23] Bell said he was impressed with Breda in her interview and said that both Whipstock and Hocker spoke highly of Breda as a bartender.

Hocker testified that she liked Breda because she was good, fast, and personable. Other employees testified that Breda was a good, reliable, fast bartender. Clark said

[20] Nora Clark testified that Cantrell would "steal a dime from her own mother."

[21] Many employees agreed that Colcord ignored waitresses and customers and was slow, although not quite as slow as Cantrell. Rhonda Breda testified that Helen Lelonde, who preceded Whipstock as lounge manager, would often tell her to go help at the bar because Colcord had fallen behind even though it was not busy. Breda also testified that Colcord could not have kept up with the new bar because she was just not fast enough.

[22] Zurawski, a union steward, among other employees, testified to that effect. Jean Lillvis testified that on Tuesday, Colcord's day off, she would have to "tear down" the bar and clean it because Colcord had let it get so bad. In fact, Colcord admitted that she left the bar messy. Another common complaint was that Colcord would not stock the front bar for the night crew.

[23] Jan Davenport testified that Buck told her that she had spoken with Bell and told Bell about Breda.

that Breda was excellent and the best bartender in the lounge. Even Cantrell, Colcord, and Karen Gobel, alleged discriminatees, agreed that Clark, Zurawski, and Breda were the fast bartenders. Cantrell admitted that all three would always appear to be working faster than she. Colcord said she had no doubts about their abilities and considered them friends.

Terry Waletzko was hired as a bartender by Hocker. She was not a former employee of the Respondent. Waletzko was interviewed by Bell twice and then by Hocker. Bell rated her "8" on the 1 to 10 scale. Waletzko impressed Bell favorably because of her personality and experience. Hocker had checked Waletzko's references and was told by her then employer that Waletzko was very qualified. However, Waletzko did not turn out to be what Bell or Hocker had expected. She has since been fired for tardiness.

2. The dining room waitresses

Madelyn Bogart, an alleged discriminatee, was hired as dining room waitress in 1974 and, except for two separate medical leaves of absence for back injuries suffered on the job, she worked until the fire resulted in her layoff. Bogart received a letter to reapply and did so in January 1981. She was interviewed by Bell who was impressed with her experience. He considered hiring her, even though Bogart explained that she had had a lot of "hassles" when she worked at the hotel before, for which she blamed management. She commented that "bus boys and dishwashers are never doing their jobs." Bell testified that he was willing to overlook those statements because from his prior investigation he had concluded that past management was poor and certainly may have contributed to difficulties experienced by employees. Bogart had also mentioned in the interview that she had fallen and hurt her back. Bell testified that at the time he did not consider that important.

Following that interview Bell told Whipstock that he was thinking of hiring Bogart. Whipstock told him, "You better be careful. You better check on that one." Bell then asked Hocker about Bogart. Hocker told Bell that she had not worked with Bogart, that Bogart had a reputation for not getting along with other employees, that she constantly gossiped about other employees, and that she was a very nervous person.[24] Hocker also told Bell that Bogart had a reputation for filing frequent and questionable workers' compensation claims. Hocker said that Bogart had filed one claim against the hotel because of a fall, and a second against another employer, the "Come-N-Dine Restaurant," also over a fall. In both cases Bogart received workers' compensation benefits as a result of filing these claims.

Bell testified that he called the "Come-N-Dine" and spoke with Ruth Ann Schrock, the manager. Bell asked Schrock about Bogart, but Schrock was unwilling to talk to Bell over the phone. Bell went to the "Come-N-Dine" where Schrock told him that Bogart had worked for her and was a good waitress but had left. Schrock then said although Bogart later reapplied, Schrock had not rehired her. When Bell asked if she would hire her now, Schrock replied, "She isn't here, is she?"[25] Based on his conversation with Schrock and the advice of Whipstock and Hocker, Bell decided not to rehire Bogart.

Cindy Borkowski, an alleged discriminatee, was hired as a dining room waitress in 1974 and worked until she was laid off because of the fire. Bell interviewed Borkowski and called her then employer, a medical clinic, where she worked as a receptionist. Bell received a good reference and was favorably impressed with Borkowski. However, Bell testified that he did observe Borkowski's nervousness during the interview and her constant fidgeting and her indecisiveness to what she wanted to do. After the interview Hocker told Bell that Borkowski was very sensitive and often became upset very easily and those traits affected her performance in the dining room. Hocker also told Bell that Borkowski was a very close friend of Mr. and Mrs. Sid Moore, former owners, and that Borkowski had a habit of reporting to Moore what occurred at the hotel. Bell had also heard that Borkowski liked her job at the clinic and had little interest in returning to the hotel. Borkowski had started working at the clinic in March 1980 and was still working there 2 years later. She had been offered a job at Bob Evans Restaurant and rejected it. Bell did not hire Borkowski.

Bernice Rankel, an alleged discriminatee, began working as a waitress in 1971. She was discharged on November 20, 1978, for gross insubordination and leaving her work station. Arbitrator Epstein later reinstated Rankel without backpay, reducing the discharge to a 10-month disciplinary suspension. Rankel returned to work on September 9, 1979, and worked until the fire. Bell interviewed Rankel after she applied. Based on the interview, he gave her low marks on willingness to help others and general attitude. Rankel was apparently considered by some to be a good waitress and was recommended for a position on reopening after the fire by Walz, an owner. Bell did not hire her.

[24] Other employees concurred with those views about Bogart. Some employees thought Bogart was a good waitress but she had a "big mouth" and complained a lot about everything. Bogart had a reputation for telling other employees what they could and could not do, including employees in the kitchen. On one occasion, while Bogart was a union steward, she complained to management about a coworker, urging management to give the employee a warning slip. That coworker, Jan Davenport, a current union steward, testified that Bogart attempted to convince management to give her, Davenport, a warning slip for not taking Bogart's assigned shift.

[25] Schrock testified that Bell did not come to her restaurant but that she told Bell on the phone that Bogart was a good worker. Schrock also testified that she never told Bell that Bogart had sued the "Come-N-Dine" and that she did not take a position on whether she would hire Bogart. Schrock, however, had written a letter to her insurance carrier concerning Bogart's claim against the "Come-N-Dine" in which she stated that the General Counsel "wanted me to say that Madelyn [Bogart] is a good worker . . . but this is one time when everything else around that record should also be told." Schrock also stated in the letter, "I sincerely pity her next employer" referring to Bogart as dishonest and charging her with trying to "rip off" someone else. She said Bell had called her and that he did not "want her [Bogart] because she seems to be either accident prone or a con-artist." During her testimony, Schrock admitted having talked to Bell and indeed Bell's version of Schrock's statements about rehiring Bogart are consistent with Schrock's own statements in her letter to her insurance carrier. Evidently Schrock did not want to testify concerning her true feelings about Bogart, but the statements in her letter convince me that Bell's testimony is truthful.

Billie Akins and Sherry Martin, former supervisors, however testified that Rankel would use obscenities liberally and that she tried to run the dining room, telling others what to do. Bell testified that despite Waltz' recommendation, which was not binding on him, he remained unimpressed with Rankel. In addition Bell decided that Rankel's difficult personality and the other employees' dislike of her outweighed any job skill she might have as a waitress. Thus, he followed Hocker's advice and did not rehire her.

Virginia Rose Forsberg, an alleged discriminatee, was hired in 1970 as a dining room waitress and worked until November 20, 1978, when she was discharged along with Rankel. As in the case of Rankel the arbitrator reduced her discharge to a 10-month disciplinary suspension. After her return she worked until the fire. Forsberg was set up for an interview with Bell and on arriving she said to Bell that she did not know why she was going through the interview knowing she was not going to be hired. Bell testified that based on that interview he did not believe Forsberg merited an offer of employment.

Melissa Phillips was hired in 1977 as a dining room waitress and worked until the fire. She applied and was interviewed by Bell. Before that interview Phillips had spoken with Bell during several visits to the hotel in December 1980. Bell testified that it was evident to him as a result of the interview that Phillips liked being a waitress and got along well with other employees. He said he was also impressed with her general attitude and outlook on life and thought she would be an asset. He hired her.

Jan Davenport originally was hired by the hotel as a dining room waitress in January 1974. She was laid off in March 1975 until October 1975, then worked until the fire. She had 12 years' experience as a waitress, a factor which impressed Bell. Hocker told Bell that Davenport was always willing to work as many hours as she could and that she often substituted as a cocktail waitress in the lounge to obtain additional work. Hocker described Davenport as a good worker based on her job performance in the lounge. Melissa Phillips testified that Davenport performed well as a dining room waitress. Phillips at the time of her testimony was a union steward. Davenport has been a union steward since February 1981.

Erma Jean Lillvis was hired as a dining room waitress in 1971. She became a bartender in 1972 but quit shortly thereafter. She returned almost immediately and, in 1975, was transferred to the position of assistant lounge manager, a bargaining unit job. She left again in 1977 after serving in the Union's negotiating team because of, according to her, intraunion disputes and her dissatifaction with her rate of pay. She returned in 1979 as a dining room waitress. Bell rated her high on the interview analysis form and Hocker recommended Lillvis highly because of her experience, ability to fill in other positions, and the fact that she was a hard worker. Bell hired Lillvis as dining room waitress.

Bell completed his dining room waitress staff by hiring nine applicants from the large pool of applicants that responded to the newspaper advertisement. He made those hiring decisions entirely on his own. He testified concerning each of these revealing that, except for the lack of input from others, he followed the same procedures in making his hiring decisions.

3. The cocktail waitresses

Karen Gobel, an alleged discriminatee, was hired as a cocktail waitress in August 1974 and continued in that position until she was laid off in February 1980 because of the fire. Hocker had talked with Bell about Gobel and had told him that Gobel would not reapply even though she was sent a letter inviting reapplication. Hocker and Gobel were friends. Gobel told Hocker in the summer of 1980 that she then was working at the University Club and liked it because she could work when she wanted. She told Hocker that she did not think the lounge would be like it was and did not want to come back. Hocker also talked to Gobel the day she applied. On this occasion, according to Hocker, Hocker asked Gobel why she reapplied and Gobel told her that someone from the Union told her to reapply to see if she would get rehired. Although she admitted talking to Hocker the day she applied, Gobel denied ever having told anyone that she did not want to come back or that the Union told her to reapply.[26]

Gobel did not get along with the other employees and did not want to work Saturday nights. Gobel was receiving Aid to Dependent Children and had told Hocker a number of times that if ADC did not force her to work she would not. In fact Gobel had trained as a bartender but then went back to being a waitress because she made too much money as a bartender to continue receiving the ADC benefits on behalf of her children.

Because Gobel was a constant complainer other employees disliked working with her. Moreover, because Gobel would not work on Saturday nights other employees felt that she was uncooperative and selfish. On the few occasions that Gobel did work on Saturday her attitude and her complaints made it so difficult for the other employees that the Respondent decided to stop calling her and it worked the shift shorthanded.[27]

During the interview with Bell, Gobel confirmed a lot of what others testified about her. Gobel told Bell that she had had many bad experiences at the hotel and had fights with other employees. Gobel said she did not know what she wanted to do and when Bell asked her why she was in the business, Gobel responded, "I got stuck with it."

Hocker decided not to hire Gobel although Gobel was a friend of hers because she did not believe Gobel had a genuine interest in returning to her former job. At the time of her application Gobel was working as a bartender at a private club and Hocker did not believe Gobel

[26] Kaye Zurawski, a union steward, testified that she and Sandy Stickler had talked with Gobel in early January 1981 after they received letters to reapply. When Zurawski told Gobel they were going to reapply, Gobel remarked that the hotel could not pay her enough to reapply and that she was not going to put up with that "crap" anymore.

[27] Gobel did not deny these observations and in fact admitted that she complained a lot and got into a fight with Stickler in December 1979. Gobel attributed her conduct to her taking diet pills which adversely affected her. However, there was absolutely no evidence that either Hocker or Stickler was told that the diet pills had affected Gobel's personality.

wanted to return to the position as cocktail waitress in the lounge which would be featuring rock 'n' roll bands and catering to a young "singles" crowd. Hocker testified that she also considered Gobel's inability to get along with her coworkers and decided that Gobel would not be a suitable employee for the hotel.

Sandy Stickler, a former lounge employee, told Hocker that, before the letters to reapply were sent out, Stickler would not come back to work at the hotel if Gobel came back. During her interview with Bell, Stickler told Bell the same thing. When Hocker called Stickler to tell her that she had been rehired and to come in for orientation, Stickler asked Hocker if Gobel had been hired. When Hocker said no, Stickler accepted the job.

Sandy Stickler started as a cocktail waitress in 1974 and worked until the fire. The interview analysis form showed that Bell was impressed by Stickler, especially her initiative. Bell noted on the form that Stickler had some management experience (Stickler was the night manager at a sandwich shop, and had quit that job to come back to the hotel). Hocker had previously told Bell that Stickler was a good cocktail waitress and that she got along with other employees. Stickler was also willing to come in on her nights off.[28] For all those reasons Hocker hired Stickler.

Adrienne Hogan had been a cocktail waitress on nights in the front lounge working with Cantrell. Hogan impressed Bell in her interview. Bell considered her "sharp," "self-satisfied," and "articulate." Hocker told Bell she had not worked with Hogan very often because Hogan was assigned to the front lounge, but Hocker knew that Hogan would work the front lounge alone when it was busy, and never fell behind. Hocker testified that she had not ever heard anything bad about Hogan and therefore decided to hire her.

Hocker also hired eight cocktail waitresses from among the applicants who responded to the newspaper advertisement. It appears that Hocker followed the same pattern of hiring for all the hirees. She looked for capable cocktail waitresses who got along with fellow employees and customers and would be able to take the fast pace and loud "music" of the new lounge.

4. The cooks

Rosemary Jones had started as a cook with the hotel in 1978 and worked until the fire. Bell interviewed her and described her as an "old pro" who wanted to learn as much as she could. Bell liked her approach and hired her.

Paul Jones had worked at the hotel as a cook until the fire. Jones impressed Bell very much during his interview, as revealed by the interview analysis form. Hocker recommended Jones very highly to Bell as a very qualified cook; he accepted responsibility well and could handle the kitchen by himself. Rosemary Jones concurred testifying that Paul Jones was well qualified as a cook.

Myrene Harris was initially recommended to Bell by several food suppliers. During her interviews she impressed Bell by her wide experience and ability to discuss food preparation and related techniques. He was convinced that she was very capable. Bell hired her and at the time of the trial she was kitchen manager.

Dell King had not worked at the hotel before the fire but was hired by Bell because Bell considered him to be an excellent cook. However, King had an alcohol problem which caused his discharge in August 1981.

Maxine Eaglebarger had worked as a pantry and salad cook in 1976 until the fire. She reapplied for the position in January and was interviewed by Bell and hired by him. Rosemary Jones testified that Eaglebarger was well qualified, and Shirley Rist, a former cook, testified that Eaglebarger was a good worker. Jean Williamson had worked as a pantry cook for the hotel but had quit shortly before the fire. Hocker had heard that Williamson wanted to return, so she invited Williamson to apply. Bell was impressed with Williamson's attitude during the interview. Williamson was described as a qualified cook by Rosemary Jones and Shirley Rist.

5. The dishwashers

Tom Banney had worked as a dishwasher before the fire. Bell interviewed him but before that interview Bell observed Banney at work at the Holiday Inn where Banney had been working as a dishwasher. Hocker told Bell that Banney was a dependable and cooperative worker and on the basis of the foregoing Bell hired Banney.

Jim Derbin had also worked as a dishwasher prior to the fire. He was known as a hard worker and was respected by his fellow employees. He was recommended to Bell by Hocker and Bell hired him.

6. The bus help

David Colcord, an alleged discriminatee, and the son of Betty Colcord, had worked at the hotel as a busboy from October 1978 until the fire. He applied for any available job in January 1981 and was interviewed by Bell. During the interview Colcord expressed a desire to be a cook but had no experience as such. Rosemary Jones, who knew Colcord, testified that Colcord was not qualified to be a cook. Although Colcord appeared somewhat indecisive, Bell rated him very highly as a result of his interview. However, on the basis of Hocker's description of Colcord's work habits, Bell did not hire Colcord. Hocker told Bell that although Colcord could have been a good worker he was continually "goofing off" and spending time in the cocktail lounge where he was not supposed to be annoying cocktail waitresses by his physical advances. In addition, he was under 21 years of age. Hocker's testimony was corroborated by Rhonda Breda, a bartender. Breda testified that Colcord was always getting in trouble for being where he was not supposed to be. Hocker told Bell that she considered Colcord grossly irresponsible. Because of those comments and the availability of better applicants, Bell decided not to offer Colcord a job.

Robert Johnston had worked as a busboy prior to the fire. Based on the favorable comments from dining room waitresses and other employees, Bell hired Johnston.

[28] Other employees testified that Stickler was a competent, dependable waitress who got along very well with the customers.

Robert Jordan had worked as a dishwasher before the fire. Bell spoke with Jordan a number of times in December 1980. Other employees recommended Jordan highly. Based on those recommendations and Bell's interview with Jordan, Bell hired him.

Bell also hired Jena Troyer as a busgirl. Bell received no adverse comments about Troyer's work among other employees. Based on his interview with her he hired her. Bell also offered bus help jobs to Jim Camren and Mark Szmanda,[29] former employees. Camren failed to report to work and Szmanda rejected the offer, preferring to remain on the job he had.

The only busboy who was hired after the fire who was not previously employed by the Respondent was Joe Lesicki, who had previous experience in the position.

F. *The Alleged 8(a)(1) Activity*

On February 25, 1981, Dale Hudson, the Union's business representative, came to the hotel to discuss a minimum wage issue with the employees. Hudson met with Millie Phillips (before she had been designated a union steward), Ann Klawiter, and Karen Horvath in a vacant banquet room to discuss this problem. Hudson had seen Bell on the premises shortly before he spoke with the three employees in the banquet room and had told Bell that he was going to be in the back of the house (banquet area) for a few minutes. Soon after Hudson entered the banquet room and was introduced by Phillips to the other two employees (who had not been employed prior to the fire), Bell appeared and inquired as to whether the girls were on breaktime. According to Phillips, Bell said, "what are you doing in here with my waitresses?" Bell then left and returned later with a warning notice which he handed to Phillips for taking an unauthorized break. Phillips told Bell that the employees had behaved similarly in the past and that he had not said anything to them then. Bell then put up "No Smoking" signs. Bell issued warning notices to them and required the waitresses to sign in and out for their breaks for a short time after this incident. Phillips told Bell that he could not do that (issuing warning notices to her, Klawiter, and Karen Horvath). Bell eventually withdrew the warning notices.[30]

G. *The March 1981 Incident*

On March 16, 1981, Hudson sent a letter to Whipstock informing him of the minimum wage problem and that Millie Phillips and Jan Davenport had been designated as union stewards. Upon receiving that letter Bell became upset because of the accusation in it that he was responsible for a violation of the Federal minimum wage law and asked Phillips what the letter was all about. Phillips said she did not know. Bell protested that if employees had complaints or problems they should come to him first. Bell said that if the employees were not going to talk problems over with him first, as suggested in article XII of the contract, then he would insist on strict enforcement of all work rules. Phillips testified that Bell told her they had a letter claiming that the waitresses were not being paid right and directed her to find out who had made this complaint. Phillips then went back to the dining room followed by Bell who was screaming at her, shaking his finger, and using obscenities. He told her, "If that is the way you're going to be Millie and the Union's going to be, I'm going to start following the contract to the rule and there will be no more smoking." Bell then put up "No Smoking" signs for a day or two.

H. *The July 1981 Incident*

In late July or early August 1981, Rhonda Breda and Frank Mancuso were assigned to work as bartenders during a banquet, for which they each received a $25 gratuity. They later concluded that the tip should have been calculated as a percentage of the total liquor charge paid by the sponsor of the banquet (which would have resulted in their being paid a higher sum). Accordingly, they filed a grievance and gave it to their union steward, Davenport, who in turn gave the grievance to Bell. Bell became upset because Breda and Mancuso had not come to him first. Bell told Davenport that the employees were correct regarding the way the gratuity should have been calculated and that he, in fact, had discovered the error on his own and had made arrangements for the additional payments. However, he was upset because they failed to discuss the problem with him as required under the collective-bargaining agreement before resorting to a written grievance. The Respondent paid Breda and Mancuso an additional $52 each in settlement of the grievance.

Beginning on the evening the grievance was submitted Bell remained in the lounge until midnight, whereas his practice before the grievance was submitted was to stay no later than 8 p.m. According to Mancuso, Bell would watch all the employees very closely. Mancuso said he overheard Bell tell someone, "well, if that's the way the bartenders want to be, we'll just do everything by the book." Mancuso also said that Bell, on one occasion, referred to Breda as a "floozy." Mancuso further testified that Bell's conduct (remaining until late in the bar, correcting employees, not permitting them to smoke in the hallway, and staring at Mancuso) lasted about a week.[31]

I. *The New Year's Eve Incident*

On December 31, 1981, after a New Year's Eve party, Jean Lillvis figured out what the employees' gratuity for that evening would be. She advised Nora Clark, the

[29] Szmanda, who received a job offer, listed Bernice Rankel, an alleged discriminatee, as a reference on his application.

[30] Art. XI, secs. 4 and 7 of the collective-bargaining agreement provided for the issuance of the warnings under the circumstances. In withdrawing the warning notices, Bell concluded after his discussion with Phillips that a misunderstanding had taken place.

[31] Former cocktail waitress Judy Spitler corroborated Mancuso's testimony. Spitler described Bell as walking around the lounge with an angry demeanor, nit-picking, and staring at employees and enforcing minor infractions of rules with meanness. Spitler testified that on that first evening Cindy Hocker told her that they were no longer allowed to smoke in the back hallway, play video games, sit in the back hallway when they were not busy, or leave their stations at any time. Spitler said that Bell scolded her for sitting in the back hallway. She said Bell also required cocktail waitress Jankowski to go out on the floor despite the fact that Jankowski told him her customers were taken care of and the area was clean. Spitler further testified that Jankowski put in her notice to quit that evening because of the abuse that Bell was heaping on the employees.

lounge manager, so that the employees could be paid. Clark thought the tip should have been more, but advised Zurawski, the union steward on duty, of Lillvis' figure. Later, several employees approached Clark complaining about the amount of the gratuity. Zurawski told Bell about this confrontation and Bell became upset because Clark had borne the brunt of someone else's error. A meeting was arranged with Bell, Walz, Whipstock, Lillvis, and Clark for the hotel and Hudson and Zurawski for the Union. Bell decided that the employees should be paid an additional gratuity. Apparently the hotel had overestimated the number of expected customers and advised the employees beforehand how much they could expect to earn based on the inflated estimate. Bell concluded the Company and not the employees should pay for the error.

Mancuso and Davenport testified that they thought Bill reinstituted a "No Smoking" rule. However, neither was on the premises for several days after the New Year's Eve party, or had observed any change themselves. Mancuso testified that he heard about it from other employees' discussions. On the other hand, other witnesses including Zurawski, the union steward, testified that no rule changes or more strict enforcement of existing rules occurred. In addition, Stanley testified that she smoked during this period of time without any repercussions.

Discussion and Conclusions

On October 20, 1981, the General Counsel issued the General Counsel's notice of intent to amend complaint in Case 25-CA-13522, and to amend the consolidated complaint in Cases 25-CA-10380 and 25-CA-10548. The complaint in Case 25-CA-13522 was amended in the following manner. It added new subparagraph 5(c) as follows:

> "(c) The Respondent, in April 1981, promulgated a rule prohibiting its employees from smoking in the hallway behind the bar."

Add new sub-paragraph 5(d) as follows:

> "(d) The Respondent in late July 1981, promulgated a rule prohibiting employees from playing video games; sitting down in the back during work time; smoking in the hallway behind the bar; and requiring employees to remain at their work stations at all times."

Add new sub-paragraph 5(e) as follows:

> "(e) The Respondent engaged in the conduct described above in subparagraphs 5(c) and (d) because its employees had joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, including the filing of or threat to file grievances."

At the hearing the General Counsel moved to further amend the complaint in Case 25-CA-13522 which motion was granted and the amendment is as follows:

Add new subparagraph 5(f) as follows:

> "(f) On or about March 17, 1981, the Respondent, acting through Fred Bell, threatened stricter enforcement of work rules because its employees had sought the assistance of the Union."

Contrary to the contentions of the Respondent, I find that the facts support the allegations and that Bell's conduct was not so minor and isolated that a finding of unlawful retaliation is unwarranted. See *General Motors Corp.*, 232 NLRB 335 (1977); *Interlake, Inc.*, 218 NLRB 1043 (1975). The Respondent admits that Fred Bell became irritated because the employees had filed grievances through their steward before coming to him as required by the contract. However, the action of the employees in these instances was protected concerted activity even though the failure to discuss the grievances before reducing them to writing may have been a violation of the collective-bargaining agreement. It was unlawful for Bell to make threats and to institute stricter work rules or to enforce rules that had not heretofore been enforced because he had been presented with former grievances prior to oral consultation. I find that the above-referred-to allegations in the complaint have been proved by a preponderance of the evidence.

With respect to the New Year's Eve incident previously discussed, Mancuso and Davenport both testified that they *thought* Bell reinstituted a "No Smoking" rule, but acknowledged that they either were not on the premises for several days after the New Year's Eve party, or had not personally observed any changes. Other witnesses including Zurawski, the union steward, testified that no rule changes restricting the enforcement of existing rules occurred. And, in addition, Stanley testified she smoked during this period of time without repercussions. I find that with respect to the New Year's Eve incident that the clear preponderance of credible competent evidence established that no changes of rules or their enforcement were implemented.

The next question that is presented is whether the Company violated Section 8(a)(3) and (1) of the Act by refusing to hire the eight alleged discriminatees. In agreement with the Respondent, in order to establish a prima facie case a violation of Section 8(a)(3) of the Act, the General Counsel must prove both that the employer had actual knowledge of the adversely affected employee protected activity and that the employee's protected activity was the motivating factor behind the discriminatory employment decision. *Wright Line*, 251 NLRB 1083 (1980). The prima facie case must be based on competent direct evidence, and not on speculation, conjecture, or surmise. *Complas Industries*, 255 NLRB 1416 (1981); *WMUR-TV*, 253 NLRB 697 (1980); *Wheeling-Pittsburgh Steel Corp.*, 244 NLRB 1015 (1979). The General Counsel must prove that the management official who actually made the employment decision had knowledge of the alleged discriminatees' protected activity and that this knowledge caused that authorized official to make that employment decision. It is not enough merely to show that some management official had knowledge when that information was not communicated to the actual decision

maker. *R & S Transport, Inc.*, 255 NLRB 346 (1981); *Dinner Bell Foods*, 239 NLRB 1115 (1978). Furthermore, general knowledge that protected activity had been engaged in by members of a particular group of employees is insufficient. The decision maker must have had knowledge of the protected activity by a particular employee before unlawful motive can be attached to the employment decision affecting that employee. *K & B Mounting, Inc.*, 248 NLRB 570 (1980); *Florida Steel Corp.*, 223 NLRB 174 (1976).

Bell was hired as food and beverage director in December 1980, and given complete control over the administration and operation of the restaurant and lounge. He was given authority to make all the employment and labor relations decisions regarding that aspect of the hotel's operation. Bell delegated his hiring authority with respect to the lounge to Cindy Hocker, his newly designated assistant food and beverage director.

Accordingly, Bell interviewed and hired applicants to fill the restaurant positions which included cooks, dining room waitresses, dishwashers, and bus persons, while Hocker hired the bartenders and cocktail waitresses for the lounge. Bell made the decisions with respect to Madelyn Bogart, Cindy Borkowski, Bernice Rankel, and Virginia Rose Forsberg, all of whom applied for dining room waitress positions, and David Colcord, an applicant for the position of busboy. Hocker made the decision with respect to Edith Cantrell and Betty Colcord as bartenders and Karen Gobel as a cocktail waitress.

Bell personally interviewed each of the former employees, including the five alleged discriminatees. Based on his interviews with the five discriminatees, Hocker's comments about their prior work performance and in Madelyn Bogart's case, the filing of questionable workers' compensation claims, Bell decided not to hire them. There is no evidence in the record that Bell had knowledge of any protected activities of these applicants or that Bell based his decision to reject these employees on unlawful criteria. Bell and Hocker both testified that they did not discuss or consider the prior protected activity of these applicants. Moreover, Bell did not even review the personnel files of these applicants. The witnesses, including the alleged discriminatees and current union stewards, testified that during the interviews Bell had not discussed, directly or indirectly, union activity, support, or sympathy. Even though there is evidence of union activities including the filing of grievances of each of the discriminatees, there is such evidence regarding Sandy Stickler, Millie Phillips, and Jan Davenport, all former employees hired by Hocker and Bell. Each filed more grievances than five of the eight alleged discriminatees.

With respect to the testimony of Rosemary Jones, a former employee previously discussed, she was hired by Bell as a cook in January 1981. In the middle of February 1981, Bell had discussed with Jones the arbitrator's decision that the former employees lost their seniority rights when their layoff extended beyond 6 months. According to Jones' first version of Bell's comments, Bell said he was glad the hotel won the arbitration because he would not have to hire back any former employees who were not hired or did not reapply. Bell then said that he picked the employees that he wanted and he did not want the previously rejected former employees because he hired who he wanted to hire. According to Jones, Bell said further that the owners picked the best workers and that he did not want any of the troublemakers that caused trouble with the Union.

Jones testified that Bell then told her he did not hire Borkowski, Colcord, and Bogart because they caused trouble, did not do their work, did not treat customers right, and stood around smoking cigarettes. However, Jones admitted that Bell did not mention the word "Union" or discuss union activities when he made the "troublemaker" statement. She said that she could only "guess" when Bell said troublemaker he was referring to union activities. She also said that under her definition of what she thought Bell meant by "troublemaker" that term would describe a number of the former employees, including herself, who were hired by Bell.

I do not put any weight on Jones' testimony with respect to her "guess" as to what Bell meant by "troublemaker." The general definition of "troublemaker," not getting along with others, is what Bell meant inasmuch as Jones included herself in that category, yet she was hired by Bell and not a definition that equates that term with union activity.

Another former employee rehired by Bell, Maxine Eaglebarger, someone whom Jones described as having been very active in the Union, disputed Jones' version of what Bell said. Eaglebarger was present when Bell was talking to Jones. Eaglebarger heard Bell make comments about the arbitration decision. She said that Bell said, "At least the troublemakers did not get hired back." Eaglebarger testified that she did not know what Bell meant by this and did not believe it had anything to do with employees having filed grievances. She added that she did not think that filing grievances would label her as a "troublemaker."

Inasmuch as the record evidence does not establish that Bell had knowledge of the prior protected activity of Bogart, Borkowski, Rankel, Forsberg, and David Colcord when he made the decision to reject them, Bell made his decision based on interviews and advice received by individuals, including Hocker who had personal knowledge of the past work performance of those persons. Even though there was no duty on the part of the Respondent to rehire any of the former employees, the Respondent sent out invitations to reapply to all the former employees. Bell and Hocker made their decisions based on the reputations that the alleged discriminatees had made for themselves and rejected them for sound business reasons, and not because of their prior union activity including the filing of grievances. I find that the General Counsel has failed to establish a prima facie case with regard to Bell's rejection of those five restaurant applicants. I shall recommend that the complaint be dismissed in its entirety with regard to those individuals. *R & S Transport*, and *Dinner Bell Foods, supra.*

As previously stated, Cindy Hocker made the decision to reject Edith Cantrell, Betty Colcord, and Karen Gobel. The burden of proof is on the General Counsel that not only did Hocker know of the protected activity

of the alleged discriminatees but also that she considered those activities in reaching the ultimate employment decision. *Wright Line* and *Dinner Bell Foods*, supra. The General Counsel did not sustain its burden with regard to the rejection of Cantrell, Betty Colcord, and Gobel.

Even though Bell interviewed those three alleged discriminatees, Hocker made the decision not to hire them. Among other factors, Hocker made her decision based on her personal knowledge of these employees from her prior employment association with them before the fire. Hocker decided not to hire them because of their poor work habits and their inability to get along with other employees. The General Counsel failed to produce any evidence on which a conclusion can be based that Hocker relied on any unlawful criteria in making those determinations. A review of the record does not reveal to what extent, if at all, Hocker knew of the protected activities of these alleged discriminatees. Hocker had been employed by the Respondent during certain periods between 1976 and through 1979, and had worked closely with Cantrell, Betty Colcord, and Gobel. But there was no showing that Hocker was aware of the protected activities. Rhonda Breda, a former employee who was rehired, testified that she did not know if Colcord had ever filed a grievance. In that respect she testified as follows:

> You know, it's not like when someone had a grievance, they went running around the whole place saying, you know, I'm going to file a grievance.
>
> Usually, when you have a problem, you take care of it with your steward, or maybe you discuss it with someone you work with, if there's been an injustice.
>
> But you don't—you know, you understand what I'm trying to say? You don't go running around the kitchen, and in the lounge saying I'm going to file a grievance.

There is no evidence in the record that Hocker had any knowledge whatsoever of Gobel's protected activity. With respect to Betty Colcord, Hocker testified that she did not discuss Colcord's protected activity with Bell and does not remember Colcord ever having filed any grievances. She did, however, testify that she had heard that Colcord filed some grievances but had no personal knowledge as to the truth of the matter. Hocker was not even aware that Colcord had been a union steward until she was so informed during the hearing. Colcord filed five grievances during her 10 years of employment, but all of them were filed in 1978 when Hocker was in Arizona. Gobel filed 11 grievances but only 6 were filed during the time Hocker was employed by the Respondent. Cantrell filed 21 grievances in her 8 years of employment, but only 8 were filed while Hocker was employed. Again, the burden was on the General Counsel to produce evidence to show that Hocker knew of the protected activities of Cantrell, Betty Colcord, and Gobel, and that burden was not met. *Pioneer Natural Gas Co. v. NLRB*, 662 F.2d 408 (5th Cir. 1981).

Assuming arguendo that Hocker had knowledge by inference of the union activities of the three alleged discriminatees, there is no evidence that Hocker had relied on this knowledge in reaching her employment decisions with respect to them.

Hocker had been a member of the Union when she was employed prior to the fire, and had filed a grievance against the hotel and complained on occasion about working conditions. She said that she had remained neutral toward the Union both while she was in the Union and when she was a manager for the hotel. There is no evidence of any union animus on the part of Hocker or that her employment decisions were motivated by her union background. The evidence establishes beyond a doubt that Hocker was interested in employing the best possible people for the lounge inasmuch as she was responsible and was expected by her superiors to run a good shop. She refused to hire anyone whom she knew to be lazy, untrustworthy, unable to get along with others, or who did not really want to work at the hotel. The Respondent had no obligation to hire those individuals. They had no greater rights than other applicants as far as seniority was concerned. Hocker did not want to saddle herself with individuals she did not think would or could do a good job when she had qualified applicants to select from, including former employees Zurawski, Clark, Breda, Stickler, Hogan, and Paulson. I find that Hocker's rejection of Cantrell, Betty Colcord, and Gobel was lawful.

I find that the General Counsel has failed to establish by a preponderance of evidence that these three individuals were rejected because of filing of grievances or other union activities. I shall therefore recommend that dismissal of the complaint in its entirety with respect to allegations concerning them. I find that the eight alleged discriminatees would not have been rehired absent any prior exercise or protected rights. *Wright Line*, supra. See also *St. Joseph Hospital*, 260 NLRB 691 (1982). The hiring decisions were based on legitimate business considerations and would have been the same had the applicants not engaged in protected activity.

Cantrell was very slow and would not have been able to keep up with the other bartenders in the new bar and she had a reputation as a thief. (That was established not only by the testimony of Hocker but by other employees.) In addition, Cantrell was unable to get along with other employees.

Betty Colcord was slow, kept a messy bar, watched soap operas all day, and ignored customers. That was attested to by several witnesses who had personal knowledge of her work habits. By contrast, all the former employees who were hired were good workers and got along with customers and their fellow employees.

Karen Gobel was a chronic complainer who engendered a considerable amount of tension among other lounge employees. There is testimony that many employees did not want to work with her. Gobel insisted on a limited work schedule which contributed to other employees' dislike for her. She refused to work Saturday nights except in emergency situations. Her inflexibility caused her coworkers to view her as selfish and self-centered. In fact, one employee, Sandy Stickler, conditioned her return to the employment of the Respondent on the nonemployment of Gobel. When Hocker was asked by

Stickler if Gobel was coming back and Hocker replied in the negative, Stickler accepted the job. Even though Gobel may have had good mechanical skills as a cocktail waitress, Hocker knew the new bar would demand more than just good skills. She said she needed an employee who was flexible, personable, and willing to pitch in. Gobel was not that employee. In addition, Hocker testified that as a result of her friendship with Gobel that Gobel did not really want to come back, that she was tired of the abuse that a cocktail waitress had to take in a popular public bar and would rather remain a bartender in a private club where she was employed at the time. Gobel had worked for the hotel for 6 years. During that period she never held a union position but she did file 11 grievances during her tenure. Sandy Stickler, whom Hocker hired as a cocktail waitress, had also worked for the hotel for about 6 years. Like Gobel, she never served in an official capacity for the Union but she did file grievances.

I am convinced that Hocker hired the best employees available who not only had good skills but who would also fit in with the other employees and with whom she could work. Hocker did not hire Gobel because she could not meet those qualifications. And I am convinced that Hocker's decision would not have been different if Gobel had not engaged in any protected activity. Certainly her hiring Stickler compelled that conclusion.

Similarly Bell's employment decisions were not discriminatorily motivated and would have been the same in the absence of any protected activity. Bell hired 12 dining room waitresses in preparation for opening day. Of these three, Millie Phillips, Jan Davenport, and Jean Lillvis had previously worked for the hotel. Four of the alleged discriminatees applied for dining room waitress positions, Madelyn Bogart, Cindy Borkowski, Bernice Rankel, and Virginia Rose Forsberg.

Bogart had worked as a dining room waitress for the hotel from 1974 through February 1980. However her employment was not continuous inasmuch she missed considerable periods of work during two medical leaves of absences for back injuries she received while on the job. Whipstock told Bell that he "better be careful" and that Bell had "better check on that one." Bell asked Hocker about Bogart. Hocker told Bell that she had not worked with Bogart before but that Bogart had a reputation for not getting along with other employees. Hocker also informed Bell that Bogart slipped and fell down a lot on the job when no one was around. Hocker also told Bell that she had fallen at her previous employer's premises, the Come-N-Dine restaurant. In spite of those comments, Bell was favorably impressed with Bogart as a result of the interview he had with her.

Bell called the Come-N-Dine restaurant and spoke with the manager after which he was convinced that Bogart would not be a good employee inasmuch as he suspected that she filed false workmen's compensation claims. In addition, she did not get along with other people; she tried to "run" the restaurant by giving orders to other employees telling them what they could or could not do. Other witnesses corroborated Hocker's testimony concerning Bogart's inability to get along with others and her inclination to tell other employees what to do even though she had no authority to do so. There is no evidence that Bell considered Bogart's prior union activity. Considering Hocker's testimony that she may have told Bell that Bogart had been a union steward, I am still convinced that having been a steward did not enter into Bell's decision not to hire Bogart.[32]

Millie Phillips, who was rehired by Bell as a dining room waitress, had worked for the hotel for 3 years prior to the fire. During her past employment with the Respondent, Phillips filed five grievances, three of which she filed with Bogart. Phillips was selected as a steward by Dale Hudson, the Union's business agent, in February 1981. Hudson described Phillips and Jan Davenport, the other steward, as clearly the best choices for this union position. Jan Davenport, also hired by Bell, had worked 6 years before the fire. Davenport filed six grievances during this time frame. Thus, Bell hired former employees who had engaged in protected activity and he rejected employees who had engaged in protected activity. I do not believe Bogart's rejection has been proven to be discriminatory.

Cindy Borkowski was hired as a dining room waitress in 1974 and worked until she was laid off because of the fire. After interviewing Borkowski, Bell called her current employer, a medical clinic, where she worked as a receptionist. Bell received a good reference, and he was leaning favorably toward hiring her. He hesitated because of some undesirable traits that she exhibited during her interview. These included excessive nervousness, fidgeting, and an expressed lack of a goal in life. After the interview Bell talked to Hocker about Borkowski. Hocker confirmed Bell's initial fears explaining that Borkowski was very sensitive and got upset very easily. Brenda Maddox, a former hostess, testified that Borkowski was a pretty good waitress but that she panicked very easily. Bell also heard that Borkowski enjoyed her job at the clinic and really did not want to come back to the hotel.

Again, there is no evidence in the record to suggest that Bell rejected Borkowski because of her prior protected activities or that she was even considered a union activist. The Union's representative, Dale Hudson, testified that Borkowski was not a union leader or a vocal supporter of the Union. Rosemary Jones said that Borkowski was never known as an employee who would file a grievance. In her 6 years of employment Borkowski filed four grievances. By comparison, Phillips and Davenport filed more grievances in less time, and were both rehired and appointed as union stewards. All four of the grievances signed by Borkowski were joint grievances that had also been signed by Phillips. I am convinced that Bell would not have rehired Borkowski even if she had not engaged in minor protected activities in which she joined others.

Bernice Rankel began working as a waitress for the hotel in 1971. As previously indicated, she was fired on November 20, 1978, and was later reinstated without

[32] Bogart worked for the hotel for 6 years, the last year as a steward. During those 6 years Bogart signed 10 grievances. Several former employees testified that Bogart did not have a reputation for filing grievances.

backpay after a 10-month disciplinary suspension. Rankel did poorly in her interview with Bell who gave her low marks on her willingness to help others and her general attitude. Bell was not impressed by Rankel and Hocker did not say anything to change his mind.

Forsberg was hired in 1970 as a dining room waitress and, like Rankel, worked until November 20, 1978, when she was fired. She also was reinstated without backpay after a 10-month disciplinary suspension. Forsberg worked until the fire. Forsberg also had a bad interview with Bell telling him in the beginning that she did not know why she was going through with the interview because she knew she was not going to be hired. He felt that Forsberg had a chip on her shoulder and inasmuch as he had no obligation to rehire any of the former employees, evidently he decided to hire only those he considered the best.

Forsberg had been a union steward for 1 month, during which time she did not submit any grievances. Rankel served as a steward for a short time in 1974. Forsberg had signed four grievances in almost 10 years of employment while Rankel joined in just three grievances in her 9 years of employment. Forsberg testified that she never spoke to the prior management about working conditions. Clearly Rankel and Forsberg were much less active and filed fewer grievances than Phillips and Davenport, the two former employees hired by Bell.

David Colcord, the eighth alleged discriminatee, had worked as a bus helper for approximately 17 months prior to the fire. As previously stated, Colcord applied for any available job in January 1981 with a particular desire to be a cook. However, Colcord testified that he told Bell in the interview that he did not want to be a dishwasher and that he would not have accepted the job as a cocktail waiter. He also said that he really did not mean he was applying for any opening. He was not qualified to be a cook. Also, as previously stated, Colcord had a reputation for bothering the cocktail waitresses and being where he was not supposed to be during working hours. However, it appears Bell was influenced in making a decision not to hire David Colcord by Hocker's extreme dislike for him. Hocker thought Colcord could be a good busboy when he was in the dining room but that it was hard to keep him there. She said that he was constantly "goofing off" in the cocktail lounge which not only violated work rules but also violated the law because he was not then 21 years old. She said Colcord would "hang out" in the cocktail lounge where he thought he had license to make physical advances towards the cocktail waitresses. Hocker told Bell that he did not like Colcord and did not want him around. Apart from being alleged discriminatee Betty Colcord's son, Colcord never filed a grievance, never had a position in the Union, and never engaged in any union activity.

The General Counsel contends that Colcord was not hired because of his relationship to Betty Colcord. The facts do not support that contention. June Stanley, whom Hocker hired as a cocktail waitress, used Betty Colcord as a reference on her application and told both Bell and Hocker that Colcord was like family to her. She even called Colcord, "Aunty Betty." Hocker hired Stanley in January 1981, and after she quit in August Bell hired her again in December. Furthermore, Bell offered a bus helper position to Marc Szmanda, which Szmanda rejected, even though Szmanda had listed Bernice Rankel as a reference. The relationship of a union official or activist is not, without more, the basis of a finding of unlawful purposes or motivation. *R & S Transport, Inc.*, 255 NLRB 346 (1981). I find that Colcord's rejection was not based on improper criteria and would have occurred had David Colcord not been related to Betty Colcord.

Of the 264 applicants who were interviewed, 38 were hired. Seventeen of the 38 were former employees and, of the 27 former employees who applied, 19 were made offers of employment. The eight who did not receive offers are the alleged discriminatees. Because of the Union's security clause in the hotel's collective-bargaining agreement, the 17 former employees who were rehired necessarily had been members of the Union. A number of the off-the-street applicants also had union backgrounds. In addition, reviewing only the former employees, it is clear that numerous former employees were hired that engaged in a considerable amount of protected activity. Conversely, five of the eight alleged discriminatees engaged in virtually no protected activity. That comparison reveals that prior activity was not a factor in Bell's or Hocker's hiring decisions. In agreement with the Respondent the alleged discriminatees were simply 8 of 226 applicants who were not offered jobs. They were not treated any differently from anyone else. It is evident that everyone was judged on his or her merits. The alleged discriminatees apparently did not measure up. In sum, I find that although there is evidence of union or concerted activity or grievance filing by most of the alleged discriminatees, except for David Colcord who filed no grievances and took no part in union activities, there is no evidence that the Respondent knew of any of these protected activities or that the Respondent treated the applicants differently because they may have engaged in such activities. To the contrary, the Respondent rehired many former employees who had filed more grievances than several of the alleged discriminatees, as indicated above. Accordingly, I conclude that the Respondent did not violate the Act when it rejected the eight alleged discriminatees.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By promulgating a rule in early April 1981, prohibiting its employees from smoking in the hallway behind the bar because such employees engaged in activity protected under Section 7 of the Act, the Respondent violated Section 8(a)(1) of the Act.

4. By promulgating a rule in July 1981, prohibiting employees from playing video games, sitting down in the back during worktime, smoking in the hallway behind the bar, requiring employees to remain at their work stations at all times because said employees engaged in ac-

tivity protected under Section 7 of the Act, the Respondent violated Section 8(a)(1) of the Act.

5. By refusing to rehire Madelyn Bogart, Cindy Borkowski, Bernice Rankel, Virginia Rose Forsberg, Edith Cantrell, Betty Colcord, and Karen Gobel, the Respondent has not violated Section 8(a)(1) and (3) of the Act.

The aforesaid unfair labor practices tend to lead to labor disputes hindering and obstructing commerce and the free flow of commerce and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices I shall recommend that the Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I shall also recommend that the Respondent post appropriate notices at its place of business in South Bend, Indiana.

Upon the foregoing findings of fact and conclusions of law in the entire record and pursuant to Section 10(c) of the Act, I issue the following recommended

ORDER[33]

The Respondent, Rambend Realty Corporation, d/b/a Ramada Inn of South Bend, South Bend, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating rules prohibiting employees from playing video games; sitting down in the back during worktime, smoking in the hallway behind the bar, and requiring employees to remain at their work stations at all times because said employees have exercised their rights under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its place of business in South Bend, Indiana, copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[34] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."